89-279

No.

Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAULINE W. KITTS, as Personal Representative of the Estate of Willard F. Kitts, Deceased,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals below correctly found that Congress had impliedly preempted state common law remedies for product liability in enacting the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. sections 1381 *et seq.*, despite Congress' express statutory command that the Act "does not exempt any person from any liability under common law"?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the district court is unreported and appears in the appendix to this Petition for a Writ of Certiorari at Pet. App. A7 through A9. The opinion of the court of appeals is reported at 875 F.2d 787 (10th Cir. 1989) and appears at Pet. App. A1 through A6.

JURISDICTION

The judgment of the court of appeals was issued on May 19, 1989. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

STATUTES AND REGULATIONS

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 80 Stat. 718 *codified* at 15 U.S.C. sections 1381 *et seq.* (1982) ("Safety Act"), provides in pertinent part, as follows:

> § 1392 (d) **Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or State governments**
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.
>
> § 1397 (c) **Continuation of common law liability**
>
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

STATEMENT OF THE CASE

This is a diversity action filed pursuant to 28 U.S.C. section 1332. Plaintiff filed her complaint on July 11, 1985, seeking damages under the common law of New Mexico for the wrongful death of her husband in a single car collision occurring on July 17, 1982. Mr. Kitts was driving a 1982 Pontiac J2000, manufactured by defendant General Motors Corporation ("GM"). Notwithstanding the fact that Mr. Kitts was wearing his three-point seat belt/shoulder harness system that had been installed in the car he was driving, the force of the crash killed him.

In her complaint, Mrs. Kitts alleged that the car was defective and unreasonably dangerous because, among other things, GM failed to utilize available technology to provide a passenger restraint system that would have allowed Kitts to survive the crash ("passive restraint claim"). GM answered the complaint denying the material allegations and asserting as pertinent to this appeal that the National Highway Traffic and Motor Vehicle Safety Act ("Safety Act") preempted Kitts' passive restraint claim.

On August 4, 1986, GM filed a Motion for Partial Summary Judgment, based only on its argument that under New Mexico law the manufacturer owed no duty to Kitts. After the exchange of briefs, the matter rested until July of 1987. Pursuant to what is obviously a coordinated nationwide campaign to raise the argument in virtually every case in which it is a defendant,[1] GM

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1. *See, e.g., Taylor v. General Motors Corporation,* 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corporation,* 865 F.2d 395 (1st Cir. 1988); *Baird v. General Motors Corpora-*

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filed a supplemental memorandum supporting its motion for partial summary judgment with the additional argument that the Safety Act preempted Kitts' common-law passive restraint claim. GM's Motion for Partial Summary Judgment was argued before the district court on September 10, 1987. After nearly three hours of oral argument, the district court took a brief recess and returned to grant GM's motion from the bench. The district court ruled that the common law of New Mexico was preempted by the Safety Act.

Thereafter the district court granted Kitts' request that the district court enter a final judgment pursuant to Fed. R. Civ. P. 54(b) on its decision from the bench. The district court entered its Order granting GM's Motion for Partial Summary Judgment. Kitts prosecuted a timely appeal under 28 U.S.C. section 1291 from that final judgment.

The appeal was fully briefed to the court of appeals by the parties. The court of appeals consolidated the appeal with another similar case from the United States District Court for the District of New Mexico. In addition, an amicus curiae brief was filed by The Products Liability Advisory Council, Inc., The Automobile Importers of America, Inc., and the Motor Vehicle Manufacturers Association of the United States, Inc., arguing that the Safety Act preempted New Mexico's common

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Footnote continued—

tion, 654 F. Supp. 28 (N.D. Ohio 1986); *Bass v. General Motors Corporation*, No. SA-86-CA-279 (W.D. Tex. September 14, 1987); *Donnelly v. General Motors Corporation*, No. 86-576JU (D. Ore. August 3, 1987); *Distler v. General Motors Corporation*, Civ. No. 4-86-821 (D. Minn. September 8, 1987); *Puzio v. General Motors Corporation*, No. L 07-2323-85 (N.J. Super. Ct. March 27, 1987); *Picadio v. General Motors Corporation*, No. GD 85-14613 (Pa. Ct. C.P. December 28, 1987).

law. Amicus Curiae briefs were filed in the consolidated appeal by The Trial Lawyers for Public Justice and The Association of Trial Lawyers of America, arguing that the Safety Act did not preempt state common law. Finally, an amicus curiae brief was filed by the United States Department of Transportation setting forth the position of the federal government on the preemption issue.[2]

On May 19, 1989, the court of appeals issued its opinion and judgment in the appeal. The court affirmed the district court's entry of partial summary judgment in favor of General Motors. The court held that "the Safety Act preempts plaintiff's air bag claim." Pet. App. A5. The court engaged in no independent analysis but rather chose to rely exclusively on the opinion of the United States Court of Appeals for the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988).[3] *See* Pet. App. A6 ("Because we believe *Wood* directly addresses and correctly resolves the issue before us, we follow the general principles articulated in *Wood* and adopt the implied preemption rule of the First Circuit.").

The *Wood* decision was rendered by a split panel of the First Circuit Court of Appeals. The *Wood* majority held that section 1392(d) of the Safety Act did

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2. Initially, the Department of Transportation took no position directly on the preemption issue, but rather called certain relevant concerns to the attention of the court of appeals. Subsequently, the Department of Transportation filed a supplemental brief setting forth its position that the Safety Act would not preempt state common law, except in certain limited situations not applicable to the *Kitts* case.

3. A petition for a Writ of Certiorari to review the court of appeals' decision in *Wood* has been filed in this Court and is presently pending. *See* No. 89-46.

not expressly preempt state common law tort claims. The majority opinion went on to hold, however, that notwithstanding the explicit language of section 1397(c) preserving all common law claims,[4] state common law tort claims based on negligent or defective design were somehow impliedly preempted. The *Wood* majority reached a conclusion of implied preemption of common law remedies solely and exclusively on its own (rather than Congress') judgment that "[a]llowing a common law action holding manufacturers liable would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area." *Wood,* 865 F.2d at 402. In reaching this conclusion, the *Wood* majority disregarded the clear and unqualified language of section 1397(c) to speculate that Congress had in mind the preservation of only certain types of common law claims when it enacted the Safety Act. *See Wood v. General Motors Corp.,* 865 F.2d at 402. The *Wood* dissent disagreed with the approach of the majority in speculating that Congress intended to preserve only certain common law claims and instead would have given effect to the clear and unqualified language in section 1397(c) which preserved claims against "any person [for] any liability under common law." *See Wood,* 865 F.2d at 421-22 (Selya, J. *dissenting*).

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4. Section 1397(c) provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

REASONS FOR GRANTING THE WRIT

Petitioner has been unable to find one case decided by this Court where preemption was found in the face of language as clearly and explicitly reflecting Congress' intent on preserving common law claims as that of section 1397(c) of the Safety Act. Quite simply, it is inconceivable to petitioner that the lower court can find preemption contrary to the express congressional statement that the statute does *not* exempt any person from any liability under common law. The present petition should be granted because the decision of the court of appeals below departs from a century of preemption analysis under the supremacy clause of the Constitution to reach a result which dangerously disrupts the delicate balance of federalism in our Republic that the supremacy clause was designed to preserve and ignores important separation of powers principles.

The approach adopted by the court of appeals below —in disregarding the expressed intention of Congress and instead resting its finding of preemption on the court's own speculative perception of a conflict between the federal statute and the state's common law[5]—ignores the

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5. *Wood*, and the lower court's opinion in the instant case, are based on two fundamental errors. First, both courts assume the false premise that because design defect verdicts may have some regulatory impact, they are therefore "tantamount to establishing . . . conflicting safety standard[s]." Pet. App. at A6. Second, both courts perceive the primacy of a goal of federal uniformity, a conclusion wholly devoid of any content rooted in Congressional action. The facts are, as the petitioners in *Wood* make clear, that Congress was well aware of the potential impact of design defect verdicts under the common law when it passed the Safety Act, with its express non-preemption declaration in section 1397(c), and, that the court's perception of a goal of federal uniformity is nothing less than a judicial

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separation of powers between the legislative and judicial branches of government and shifts the focus of inquiry under preemption analysis from what Congress intended to the court's own perception of proper policy. These important concerns require authoritative resolution by this Court, since the numerous cases addressing the preemptive effect of the Safety Act have provoked conflicting decisions in the lower federal and state courts.

1. The Implied Preemption of State Common Law Sets a Dangerous Precedent, Threatening the Vitality of Our Precious Common Law Heritage, Disrupting the Delicate Balance of Federalism in Our Republic, and Violating Fundamental Principles of Separation of Powers.

GM's arguments below and its coordinated campaign in the courts throughout the country constitute a frontal assault on the common law. What GM seeks is to substitute administrative rulemaking (which not coincidentally GM has considerable ability to influence)[6] for the

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Footnote continued—

weighing of conflicting policies, which is directly contrary to that expressly engaged in by Congress. *See Wood v. General Motors Corp.*, No. 89-46, Pet. at 13-19. GM's argument (accepted by the *Wood* court and the court below in this case) reduces itself to the proposition that anytime Congress authorizes a federal administrative safety standard, the adoption of that standard necessarily forecloses any product liability claim based on design defect when the standard has been met, even where Congress has expressly declared to the contrary.

6. The history of FMVSS 208, upon which GM and the courts below relied in finding preemption, is a perfect example of what is wrong with administrative rulemaking, even for its legitimate and limited purposes, much less as a substitute for common law remedies for injuries. For nearly twenty years after the technology for air bags was available and after it was known that the introduction of such systems would save

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common law system for remedying injuries. Of course, as a result of its campaign, Mr. Kitts' survivors and thousands of other persons maimed or killed because of defectively designed automobiles will be without any remedies whatsoever. Equally important, GM seeks to employ the federal courts to stifle and thwart the evolving common law of product liability in the states, a development that is nearly universally recognized as one of the signal developments in the law in the twentieth century.[7]

Footnote continued—

scores of thousands of lives, GM and other car manufacturers dragged their feet and repeatedly forced the administrative agency, the National Highway and Transportation Safety Administration to back off from its proposed rules requiring introduction of passive restraint systems. GM's obduracy was matched only by the administrative agency's pusillanimity. *See* Insurance Institute for Highway Safety, "Air Bags: A Chronological History of Delay" (1984). Indeed, Mr. Kitts' car was not equipped with air bags because at the time his car was manufactured the administrative agency had illegally rescinded its rule requiring air bags, as determined by this Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983). Ironically the same party in *State Farm* unsuccessfully seeking to defend the arbitrary and capricious rescission of the rulemaking was an amicus curiae in the court below, urging that the Safety Act preempts the states' common law.

7. For more than seventy years—at least since Chief Judge Cardozo's seminal decision in *MacPherson v. Buick Motor Co.*, 217 N.Y.2d 382, 111 N.E. 1050 (1916)—the common law has imposed on manufacturers of negligently designed or manufactured automobiles liability to compensate victims who have been injured as a result of the manufacturer's negligence. With its characteristic flexibility and adaptability, the common law in this area has evolved into one of this century's major legal developments, the law of product liability. Sometimes employing a negligence standard and sometimes employing a standard of strict liability, product liability law requires that a manufacturer be held responsible to compensate those who are injured by the manufacturer's negligence or by a defect in the product which poses an unreasonable danger to the foreseeable user.

The supremacy clause of article VI of the Constitution is central to the structure of our federal system. Because the effect of the supremacy clause is to invade the sovereignty of the individual states, the preemption power is vested exclusively in Congress. What this means is that state law is not preempted just because a federal judge prefers the federal policy to the state policy; or even where a federal judge may determine that the state policy is in conflict with the federal policy. The touchstone is congressional intent to preempt state law. *See, e.g., Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 369 (1986); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963). The federal court may find state law preempted *only* where the court determines that Congress has intended to preempt state law.

In this respect, the power to preempt state law belongs to Congress exclusively, and the role of the federal court is to determine the congressional intent and to apply it. This is the reason why this Court has stated that in determining whether state laws are preempted by federal statutes, the "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra,* 479 U.S. 272, 280 (1987). Moreover, the "courts should not lightly infer pre-emption," *International Paper Co. v. Ouellette,* 479 U.S. 481, 491 (1987), and there is a heavy presumption against finding preemption where the claim of preemption addresses the historic police powers of the state, such as common law tort liability. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144 (1963); *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529, 1542 (D.C. Cir. 1984). "[W]e start with the assumption that the historic police powers of the States were not to be superceded by the Federal

Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The court of appeals' decision below ignores this Court's injunction and trenches on historic state powers in the absence of a manifest congressional purpose to do so. The effect of the decision below is to quash an important area of common law development in the states. This effect, of course, is not limited to those areas of common law product liability dealing with design defects in automobiles. The reasoning of the court of appeals below would apply also to the many other areas in which Congress has enacted minimum design standards. The potential impact on this important area of common law development, therefore, is great.

From Pollock[8] to Plucknett[9] to Pound,[10] the common law has been recognized as a prized part of our Anglo-American legal heritage and a cornerstone of our legal system. The founding fathers of the Republic expressly and specifically recognized the common law as one of the bulwarks of political liberty.[11] This Court has rec-

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8. *See, e.g.*, F. Pollock, *Oxford Lectures and Other Discourses* 111 (London 1890) *reprinted* edition 4 *Classics in Legal History* (R. Mersky & J. Jacobstein eds. 1970) ("So venerable, so majestic, is this living temple of justice, this immemorial and yet freshly growing fabric of the Common Law, that least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there.").

9. *See* T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956).

10. *See, e.g.*, R. Pound *The Spirit of the Common Law* 4-5 (Beacon ed. 1963) (extolling the "vitality and tenacity" of the common law).

11. Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means

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ognized that the common law is a matter distinctly reserved to development in the several states. For example, Justice Holmes repeatedly attacked the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) as impermissibly infringing on the states' sovereign power to develop their respective common laws. *See Black and White Taxicab and Transfer Co. v. Black and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting) ("The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State . . . ."). Justice Holmes' view, of course, was vindicated in *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938). The same evil which Justice Holmes identified and which caused this Court to overturn *Swift* in *Erie* prohibits federal judges, independent of the will of Congress, from preempting state common law.

It is precisely these interests and concerns which animated this Court to impose a particularly heavy presumption against a finding of preemption of state common law remedies. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Nader v. Allegheny Airlines,*

Footnote continued—

> of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties declare . . .
>
> 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers in the vicinage, according to the course of law.

Declaration of Rights of the Continental Congress (1774), *as excerpted in* R. Pound, *Readings on the History and System of the Common Law* viii (2d ed. 1913). Similar sentiments were expressed fifteen years later in the seventh amendment to the Constitution of the United States.

426 U.S. 290, 298 (1976); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-13 (1971). The presumption against finding preemption reflects two salient concerns. First, the presumption reflects a deference to the sovereignty of the states, especially in those areas that have been traditionally reserved to state supervision. *See Rice*, 331 U.S. at 230. Second, the presumption reflects a caution on the part of the courts in attributing to Congress an intent to leave injured persons without remedies. As this Court stated in *Silkwood*, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251; *see also United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954).

If it was "difficult" for this Court in *Silkwood* to believe that Congress would silently remove common law remedies for injuries, it is inconceivable in this case to believe that Congress did so in the face of its explicit command in section 1397(c) that the Act "does not exempt any person from any liability under common law." This language, of course, is what compelled the court of appeals below to hold that Congress did not express an intention to preempt. While this conclusion is unassailable, it makes indefensible the remainder of the court's analysis, that somehow the Safety Act impliedly preempts state common law. Once the court of appeals correctly concluded that Congress had expressly considered the matter, it made no sense to even address implied preemption. Congress considered the preemptive effect of the Safety Act in sections 1392(d) and 1397(c) and as the court of appeals found did not thereby intend to preempt common law remedies. In this context, any

finding of implied preemption must rest not on Congress' intent but rather on the court's own perception of policy.[12]

If the court of appeals' decision is left to stand, we will be back to pre-*Erie* days, where federal courts on the basis of their own determinations of proper policy can invade state sovereignty and displace important segments of state common law development. Under the supremacy clause, this is a power conferred only on Congress and Congress' intent to exercise that power is not to be casually or lightly inferred. The court of appeals' decision at once ignores the separation of powers by arrogating to the courts a power reserved exclusively to Congress and disrupts the balance of federalism preserved by the supremacy clause by invading state sovereignty and displacing this important common law area. This Court should grant review to reestablish the proper constitutional roles and balances.

2. The Decision of the Court of Appeals Is Manifestly in Error and Works a Grave Injustice.

While this Court does not exercise its certiorari review power solely to rectify errors and correct injustices, these considerations are not wholly irrelevant. The court of appeals' decision is wrong for so many reasons that

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12. In an analogous context, this Court has refused to find an implied administrative preemption in the face of language in the federal statute which clearly evinced an intent not to give the administrative agency the power to displace state law. *Louisiana Public Service Commission v. FCC*, 476 U.S. at 473-76. In *Louisiana PSC*, the statutory language precluded finding express preemption. The FCC then argued that state regulation would frustrate the federal policies. This Court held that the express statutory language precluded a finding of implied preemption, even if the federal policies would be frustrated. *Id.* at 476. ("While we do not deprecate this concern, § 152(b) precludes both the FCC and this Court from providing the relief sought [preemption of state regulation].").

it seems incredible that the court below, as well as two other circuit courts,[13] reached that result.

First, the decision contradicts Congress' explicit command that the Safety Act "not exempt any person from any liability under common law." 15 U.S.C. section 1397(c).

Second, as described in Point 1, above, the court incorrectly proceeded to find implied preemption after it had determined that Congress explicitly adverted to the preemptive effect of the statute and Congress' expression of the preemptive effect preserved rather than preempted common law remedies. *Cf. Louisiana Public Service Commission v. FCC, supra.*

Third, the court of appeals' decision wholly ignores the heavy presumption, articulated by this Court, against finding preemption of common law remedies. *See Silkwood v. Kerr-McGee Corp., supra; Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

Fourth, the court of appeals erroneously identified "uniformity" as a primary goal of Congress in enacting the Safety Act. Pet. App. A6. Nowhere in Congress' own expression of its purposes is uniformity even mentioned, much less identified as a primary purpose. *See* 15 U.S.C. section 1381.

Fifth, even assuming that "uniformity" were a primary purpose of the Safety Act, common law remedies for damages do not frustrate that legislative goal. Com-

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13. In addition to the instant decision and that of the first circuit in *Wood*, the eleventh circuit reached the same result in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989).

mon sense and human experience both suggest that federal minimum design standards can and do coexist with the continuation of damages actions for injuries sustained. Certainly they have coexisted for the twenty years between the passage of the Safety Act in 1966 and the current decisions that are at issue in this petition.

In addition to being manifestly in error, the court of appeals' decision works a grave injustice. If allowed to stand, the decision below deprives Mrs. Kitts of any remedy for her grievous loss, even though General Motors may have been flagrantly negligent in its design. This injustice, of course, will be visited not only on Mrs. Kitts but also thousands of other victims. This Court has repeatedly expressed a solicitude for protecting common law remedies from disruption through speculative claims of preemption. *See, e.g., Silkwood v. Kerr-McGee Corp., supra.*

3. The Preemptive Effect of the Federal Safety Statute Presents a Question of Wide and Enduring Significance, Provoking Conflicting Decisions in the Lower Federal and State Courts. The Issue Requires Final Resolution by This Court.

There is no doubt that over the past three years or so, there has been a coordinated and concerted program among automobile manufacturers to raise the argument that the enactment of the Safety Act preempts state common law remedies based on defective or negligent design. The issue has been raised and addressed in more than twenty cases and the courts have substantially divided in result.[14] There is equally no doubt that

14. Numerous cases have addressed the preemption issue and resolved it in favor of preserving common law remedies.

(Continued on following page)

this issue will continue to be raised until it is finally resolved by this Court. The decision below presents the issue squarely to this Court. The considerations have been sufficiently explored and refined. This Court, therefore, should grant this petition to address the important issue raised and finally resolve it.

Footnote continued—

See, e.g., Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987); *Garrett v. Ford Motor Co.*, No. JH-86-582 (D. Md. August 21, 1987); *Seemann v. General Motors Corp.*, No. 86-6145 (CL)"AI" (Fla. Cir. Ct. March 7, 1989); *Picadio v. General Motors Corp.*, No. GD 85-14613 (Pa. Ct. C.P. December 28, 1987); *Kimbrel v. Jones*, No. 85-6068B (Tex. Dist. Ct. October 13, 1987); *Steenbergen v. Ford Motor Co.*, No. 85-15718-C (Tex. Dist. Ct. June 30, 1986); *Lynch v. Mims*, No. GCG 85-0019 (Fla. Cir. Ct. August 20, 1985); *Morgan v. Noble*, No. 84-Cl-136 (Ky. Cir. Ct. February 17, 1986); *Munson v. Pearcy*, No. B-840,570 (Tex. Dist. Ct. May 15, 1986); *Barfels v. Holman Imports*, No. 85-1901-CB (Fla. Cir. Ct. September 1985); *Burge v. Blight*, No. 44-74-75 (Cal. Super. Ct., Orange County June 30, 1987).

In addition to the cases noted above in footnote one, there are numerous cases both federal and state which have found common law remedies to be preempted. *See, e.g., Schick v. Chrysler Corp.*, 675 F. Supp. 270 (D.S.D. 1987); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1988); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. November 4, 1986); *Phillis v. Naime*, No. 85-33951-CA-07 (Fla. Cir. Ct. September 22, 1986); *Pederson v. Ford Motor Co.*, No. 3AN-85-15565 (Alaska Super. Ct. September 24, 1987); *Gardner v. Honda Motor Co.*, Index No. H-72107 (N.Y. Sup. Ct. August 26, 1987); *Ross v. Ford Motor Co.*, No. CV119361 (Ohio Ct. C.P. May 5, 1987); *Soboscienski v. Ford Motor Co.*, No. 2NO-85-246 (Alaska Super. Ct. October 28, 1986); *Mackey v. American Honda Motor Co.*, No. 83CV-08-4508 (Ohio Ct. C.P. December 29, 1986).

CONCLUSION

For all the above reasons, petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

(Filed May 19, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-2517

PAULINE W. KITTS, as Personal Representative of the Estate of Willard F. Kitts, Deceased,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

PRODUCT LIABILITY ADVISORY COUNCIL, INC., AUTOMOBILE IMPORTERS OF AMERICA, INC., and MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.,
Amicus Curiae.

No. 88-1900

WAYNE M. RICHART, as Personal Representative of the Estates of Norman J. Richart, Deceased, and Jean R. Richart, Deceased,
Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,
Defendant-Appellant.

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA; TRIAL LAWYERS FOR PUBLIC JUSTICE; and UNITED STATES OF AMERICA,
Amici Curiae.

Appeal From the United States District Court
for the District of New Mexico
(D.C. CIV 85-0967 JC for Tenth Cir. No. 87-2517)
(D.C. Civil No. 86-0926-JB for Tenth Cir. No. 88-1900)

Joseph Goldberg of Carpenter & Goldberg, P.A. Albuquerque, New Mexico (William H. Carpenter and David J. Stout of Carpenter & Goldberg, P.A., and William E. Snead of Ortega & Snead, P.A., Albuquerque, New Mexico, with him on the briefs), for Plaintiff-Appellant in No. 87-2517.

David M. Heilbron of McCutchen, Doyle, Brown & Enersen, San Francisco, California (Leslie G. Landau of McCutchen, Doyle, Brown & Enersen, San Francisco, California; Thomas E. Fennell of Jones, Day, Reavis & Pogue, Dallas, Texas; John P. Raleigh and Nicholas J. Wittner of General Motors Corporation, Detroit, Michigan; Russell D. Mann and Bob F. Turner of Atwood, Malone, Mann & Turner, Roswell, New Mexico, with him on the brief), for Defendant-Appellee in No. 87-2517.

(William H. Crabtree and Edward P. Good, Detroit Michigan; Charles H. Lockwood II, Arlington, Virginia; and Paul M. Bator and Stephen M. Shapiro of Mayer, Brown & Platt, Chicago, Illinois, on the brief for Amicus Curiae in No. 87-2517.)

* * * * *

Malcolm E. Wheeler of Skadden, Arps, Slate, Meagher & Flom, Los Angeles, California (Robert G. McCorkle of Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, with him on the briefs), for Defendant-Appellant in No. 88-1900.

Walter J. Melendres of Montgomery & Andrews, P.A., Santa Fe, New Mexico, for Plaintiff-Appellee in No. 88-1900.

(Arthur H. Bryant of Trial Lawyers for Public Justice, Washington, D.C., on the brief for Amicus Curiae Trial Lawyers for Public Justice, P.C. in No. 88-1900.)

(Larry E. Coben of Litvin, Blumberg, Matusow & Young, Philadelphia, Pennsylvania, and Eugene E. Pavalon, President, The Association of Trial Lawyers of America, Chicago, Illinois, on the brief for Amicus Curiae The Association of Trial Lawyers of America in No. 88-1900.)

(B. Wayne Vance, General Counsel, and Kenneth N. Weinstein, Deputy Assistant General Counsel, U.S. Department of Transportation; Erika Z. Jones, Chief Counsel, and David W. Allen, Assistant Chief Counsel, National Highway Traffic Safety Administration, Washington, D.C.; William L. Lutz, United States Attorney for the District of New Mexico; John R. Bolton, Assistant Attorney General, and Douglas Letter, Appellate Litigation Counsel, Civil Division, Department of Justice, Washington, D.C., on the brief for Amicus Curiae United States in No. 88-1900.)

Before McKAY, McWILLIAMS, and BALDOCK, Circuit Judges.

McKAY, Circuit Judge.

Kitts v. General Motors Corp., No. 87-2517, and *Richart v. Ford Motor Co.*, No. 88-1900, were separately submitted to us. On our own motion we consolidate for purposes of disposition of the preemption issue before us in both cases.

Although the cases before us are not factually identical, appellants raise the same issue on appeal: whether section 1392(d) of the National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 (1982), preempts state tort claims against automobile manufacturers who comply with Federal Motor Vehicle Safety Standards ("FMVSS") regarding occupant crash protection but fail to install air bags as well. *See* 15 U.S.C. § 1392(d) (1982)[1] and FMVSS 208, 49 C.F.R. § 571.208, S4.1.2 (1987).[2] In each case the plaintiff sued an automobile manufacturer under New Mexico tort law alleging that an automobile manufactured by it was negligently and defectively designed because it did not have a passive restraint system, *i.e.*, air bags, in addition to or instead of federally approved safety belts.[3]

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1. Section 1392(d) states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d) (1982).

2. FMVSS 208 details the occupant crash protection options a manufacturer may install in passenger vehicles in order to comply with federal motor vehicle safety standards. At the time these automobiles were manufactured, a manufacturer could comply with FMVSS 208 by installing (1) a complete passive protection system for front and lateral crashes; (2) passive protection for frontal crashes plus lap belts with belt warning for side crashes and rollovers; or (3) manual lap and shoulder belts with belt warning. 49 C.F.R. § 571.208, S4.1.2 (1987).

3. In *Richart*, plaintiff alleged that the car was negligently designed, and not crashworthy, because it lacked air bags. In *Kitts*, plaintiff alleged that the car was defective and unreasonably dangerous because the manufacturer failed to utilize available technology, *i.e.*, air bags, which would have prevented the death of plaintiff's decedent.

Both defendants moved for partial summary judgment on the ground that the Safety Act preempts plaintiffs' air bag claims.[4] *See* 15 U.S.C. § 1392(d) (1987). In response to defendants' motions, each plaintiff argued that its claim was a common law tort claim expressly saved by section 1397(c) of the Safety Act. *See* 15 U.S.C. § 1397(c) (1982).[5] The district courts reached opposite conclusions: The trial court in *Kitts* held that the Safety Act preempts plaintiff's air bag claim; the trial court in *Richart* held that the Safety Act does not preempt plaintiff's air bag claim.

We conclude that the Safety Act preempts plaintiff's air bag claim. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). For our purposes, *Wood* is almost identical to the cases before us: the plaintiff alleged under state law that the automobile manufactured by the defendant was defective because it was equipped with safety belts rather than air bags or another passive restraint system (*e.g.*, automatic safety belts). The defendant moved for summary judgment on the ground that the Safety Act and FMVSS 208 promulgated under the Act preempt plaintiff's claim.

In *Wood*, the First Circuit rejected an express preemption claim, but held that section 1392(d) of the Safety

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4. The *Richart* defendant moved for partial summary judgment on the additional ground that the Safety Act and Federal Motor Vehicle Safety Standard 208 impliedly preempt plaintiff's air bag claim. The *Kitts* defendant moved for partial summary judgment on the additional ground that it owed no duty to the decedent under New Mexico law. Due to our disposition of the preemption issue, we need not reach *Kitts'* second ground. *See* discussion *infra*.

5. Section 1397(c) states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c) (1982).

Act and FMVSS 208 impliedly preempt plaintiff's passive restraint claim. The Court found that

> Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent.
>
> Such an action is . . . impliedly preempted because it would effectively circumvent section 1392(d)'s prohibition of nonidentical state standards covering the same aspect of performance as a federal safety standard. Allowing a common law action holding manufacturers liable for failing to install air bags in motor vehicles would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area.

Id. at 402 (emphasis in original). Because we believe *Wood* directly addresses and correctly resolves the issue before us, we follow the general principles articulated in *Wood* and adopt the implied preemption rule of the First Circuit.

In view of our determination that the Safety Act preempts plaintiff's air bag claim, we affirm the trial court's grant of partial summary judgment to the defendant in *Kitts* and reverse the trial court's denial of partial summary judgment to the defendant in *Richart*. We also direct the trial court in *Richart* to enter partial summary judgment for the defendant.

(Filed October 2, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 85-0967 JC

PAULINE W. KITTS, as Personal Representative of the Estate of WILLARD F. KITTS,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
a foreign corporation,
Defendant.

FINAL JUDGMENT

THE COURT, having granted Partial Summary Judgment on Defendant General Motors Corporation's Motion for Partial Summary Judgment, and

The Court having directed that the Clerk enter a final judgment dismissing Plaintiff's "air bag" claim, now therefore,

IT IS ORDERED that Final Judgment be, and hereby is, entered dismissing the Plaintiff's "air bag" claim against the Defendant General Motors Corporation.

DONE at Albuquerque, this 2nd day of October, 1987.

/s/ Jesse Casaus
Clerk, U.S. District Court

(Filed September 29, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 85-0967 JC

PAULINE W. KITTS, as Personal Representative of the Estate of WILLARD F. KITTS,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
a foreign corporation,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT ON PLAINTIFF'S "AIR BAG" CLAIM

Defendant General Motors Corporation's Motion for Partial Summary Judgment on Plaintiff's claim that her 1982 Pontiac J-2000 should have been equipped with air bags came on for hearing before the Court on September 10, 1987. Upon consideration of the pleadings, briefs and the oral arguments of counsel, the Court finds:

1. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1381, *et seq.* ("Safety Act") and regulations promulgated thereunder were intended by Congress to preempt any non-identical state standards, whether established through the application of common law principles of liability or otherwise, as to any federally regulated aspect of vehicle performance.

15 U.S.C. §1392(d). Accordingly, Plaintiff's air bag claim is preempted by 15 U.S.C. §1392(d) and is not saved by 15 U.S.C. §1397(c). *E.g., Donnelly v. General Motors Corp.*, No. 86-576-JU, District Court of Oregon, August 30, 1987 (adopting Magistrates rulings of June 22, 1987; *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095 (E.D. Mo. 1986). Moreover, Plaintiff's air bag claim, if permitted, would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Safety Act and Federal Motor Vehicle Safety Standard 208, and is preempted for this reason as well. *E.g., Baird v. General Motors Corp.*, 654 F.Supp., 28 (N.D. Ohio 1986); *Wattelet v. Toyota Motor Corp.*, (D. Mont. April 27, 1987); *Wickstrom v. Maplewood Toyota, Inc.*, Consumer Prod. Safety Guide (CCH) Para. 75,377 at 61,265 (Minn. Dist. Ct. March 12, 1987).

2. Defendant General Motors Corporation had no duty under New Mexico law to equip the subject vehicle with air bags. Accordingly, Plaintiff's air bag claim does not state a cause of action under New Mexico law.

3. There is no just reason for delay in entering a final judgment dismissing Plaintiff's "air bag" claim.

IT IS THEREFORE ORDERED that Defendant General Motors Corporation's Motion for Partial Summary Judgment be, and it hereby is, granted.

IT IS FURTHER ORDERED that the Clerk of this Court be, and hereby is, directed to enter a final judgment, dismissing Plaintiff's "air bag" claim.

DATED this 28th day of September, 1987.

/s/ John E. Conway
United States District Judge